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By W. S. Horton for D. C. (Reply)

Supreme Court of the United States.

Filed Nov. 15, 1900.

OCTOBER TERM, A. D. 1900.

LOUIS J. GABLEMAN, JR.,
By his next friend,
LOUIS J. GABLEMAN, SR.,
Plaintiff in Error,

vs.

PEORIA, DECATUR AND EVANSVILLE RAILWAY COMPANY,
EDWARD O. HOPKINS,
Receiver of the PEORIA, DECATUR AND EVANSVILLE RAILWAY COMPANY,
AND
GEORGE COLVIN,
Defendants in Error.

Certificate from Circuit Court of Appeals, Seventh Circuit.

REPLY FOR DEFENDANTS IN ERROR.

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It was agreed between the attorneys for the respective parties, that this case should be submitted upon printed argument, the argument for defendants in error to be first filed, because they were the moving cause of the certificate to this court, and with the right reserved to them of filing a reply to the argument for plaintiff in error, should they deem it necessary. This reply is presented, because of the case of *Chicago, Rock Island & Pacific Railway Company* vs. *Martin*, reported in volume 178 U. S. Reports, on

page 245, issued since the main argument for defendants in error was filed. That case is cited by plaintiff in error as authority for the denial of the jurisdiction in this suit. The distinction, however, between that case and this seems to us apparent.

The case of *Chicago, Rock Island & Pacific Railway Company* vs. *Martin*, was brought against the Chicago, Rock Island & Pacific Railway Company and Clark and others, who were receivers of the Union Pacific Railway Company, to recover damages for the death of the plaintiff's intestate, while a passenger on a train of the Union Pacific Railway Company, with which a train of the Chicago, Rock Island & Pacific Company collided. The declaration or complaint charged the servants of each defendant with negligence in the operation of their respective trains, and that, through such negligence, they jointly caused the death. It was, therefore, a case against defendants, each of whom participated in the negligence alleged to have caused the injury. The receivers in that case were not receivers of the property of the other defendant and in the sole management of such property, at the time complained of. Each of the defendants was, through its servants, in the active use of the railroad and through their joint neglect, the death was caused. Manifestly, the case presented a joint cause of action.

The certificate in the present case states different conditions. The receiver was, "at the time the injuries were sustained and the suit was commenced, receiver of the defendant railway company by ap-

pointment of the United States Circuit Court for the Southern District of Illinois, and was, at the time of the injuries, in the sole control and management of the railway company." The company, therefore, was not present, through its servants, or otherwise, and in no way participated in, or was responsible for, the injury. The rule of liability, under such circumstances, is stated by a text writer as follows:

"Section 721. It is well established that a railway corporation, which is in the hands of a receiver, who is operating the road as a common carrier, under statutory provisions or by virtue of an order of court, is not accountable for injuries occasioned by the negligence of the employes of the receiver. If a corporation be sued for such injuries, it has a perfect defense in the plea that at the time the injuries complained of were inflicted, it was in the hands of a receiver, duly appointed and operating the road. This rule is well founded upon principle, since the corporation after the appointment, has no control over the employes of the receiver; and also for the further reason that, as we have just stated, the receiver is responsible for such injuries in his official capacity, and judgment may be had against the estate in his hands."

Beach on Receivers, Section 721.

The conclusion of that writer is supported by numerous decisions, among others, the following:

Hicks vs. *I. & G. N. R. R.*, 62 Tex. 38;
Metz vs. *B. C. & P. R. R.*, 58 N. Y. 61;
Turner vs. *Hannibal & St. Joe*, 74 Mo. 602;
Chamberlain vs. *N. Y. L. E. & W. R. R.*, 71 Fed. 636;
Jewett vs. *Whitcomb*, 69 Fed. 417;
Warax vs. *Railway Company*, 72 Fed. 637;
Memphis, etc. Railroad vs. *Hoechner*, (C. C. A. 6th Ct.) 67 Fed. 456;

The case here presented is one in which the possession of the receiver was exclusive, and the employes were hired and controlled by him. The road was not being managed on the joint account of the receiver and lessees of the company, as in *Railroad Company* vs. *Brown*, 17 Wall. 445, nor was it controlled by the agents and employes of the company, or the receiver's functions restricted to the receipt of a share of the net earnings, as in *Pennsylvania Railroad Company* vs. *Jones*, 155 U. S. 333. It is a case of property being in the sole control and management of a receiver, and, therefore, no case was stated against the railway company, one of the defendants, and as between the plaintiff and the railway company and receiver, a single controversy is stated, and that between the plaintiff and the receiver.

In our argument in chief, numerous decisions were cited to sustain the contention that a joint liability was not shown against the receiver and his engineer, George Colvin. There are two charges of negligence: one in the operation of a railway train, the other, the failure to properly operate the gates at a railway crossing. It is certified that George Colvin was in the employment of the receiver, as a locomotive engineer, and, as his servant was operating the engine at the time of the injury, but that his duties did not extend to the operation or maintenance of the gates at the railway crossing; therefore, in so far as the record presents a liability dependent on negligence in operating the crossing gates, the controversy between the receiver and the plaintiff is wholly sepa-

rate and distinct from that against the other defendants.

But if the cause of action against the receiver and his engineer were joint, it should make no difference to the receiver's right of removal. We respectfully submit that the rule governing that view of the case, was correctly stated by Judge Baker, of the Circuit Court, in his opinion, as follows:

"But if the cause of action against the receiver and his engineer were joint, it would make no difference in the receiver's right of removal. No liability can be asserted against the receiver, for misfeasance or nonfeasance in performing the duties of his office, except under and by virtue of the laws and constitution of the United States. The joint liability asserted in the complaint against the receiver and his engineer is one arising from and growing out of the operations of the receivership, and hence is one arising under the constitution and laws of the United States, under and in virtue of which the receivership was created and exists."

Gableman v. B. & O. R. R. Co., 82 Fed. 79.

The negligence of Colvin, the engineer, grew out of the operation of this federal receivership, and hence the suit, whether viewed with reference to his act or that of the receiver, was one arising under the constitution and laws of the United States.

The certificate, however, does not state a case of joint liability between the receiver and Colvin. He was the engineer in charge of the engine, the negligent operation of which is alleged as one cause of the injury. He was the servant of the receiver. The receiver was not personally present and participating in the negligence. The liability of the engineer arose from his own wrongful act in running the engine

against and over the plaintiff, while that of the receiver, so far as liability depends on the negligence of Colvin, grows out of the master's liability for the negligent or tortious act of his servant when engaged about the master's business.

The rule was stated by Chief Justice Gray, in *Mulchey* vs. *Religious Society*, 125 Mass. 487, as follows:

"If there was any negligence in the agents, Barber & Sleeper, for which they could be held liable, their principal, the society, would be responsible, not as if the negligence had been its own, but because the law made it answerable for the acts of its agents. Such negligence would be neither in fact nor in legal intendment the joint act of the principal and of the agents, and therefore both could not be jointly sued. It is not like the case of a wilful injury done by an agent by the command or authority of his principal, in which both are in law principal trespassers and, therefore, liable jointly."

Hopkins, the receiver, was in the possession and management of the railroad, and it may be properly assumed that his orders were for the careful operation of the trains, and that, in so far as Colvin was negligent, he violated the rules of the receiver. The certificate does not present a case of an injury done by the servant by command or authority of his employer, but rather a breach of the principal's orders, and, hence, it was not their joint act or neglect which caused the injury. The authorities which hold a master is not jointly liable with his employe, in such cases, are numerous, including the following:

Warax vs. *C. N. O. & T. P. Ry.*, 72 Fed. 637;
Clark vs. *Frye*, 8 O. St., 358, 377;
Campbell vs. *Sugar Co.*, 62 Me. 553;
Page vs. *Parker*, 40 N. H. 47-68;
Landers vs. *Felton*, 73 Fed. 311;
Hartshorn vs. *A. T. & S. F. R. R.* (C. C. Mo.), 77 Fed. 9;
Herman Berghoff Brewing Co. vs. *Przbylski*, 82 Ill., App. 361;
Doremus vs. *Root, et al.* (C. C. Wash.), 94 Fed. 760;
Burch vs. *Caden Stone Co.*, 93 Fed. 161.

The authorities sustain the contention that this certificate submits facts showing a separable controversy between the receiver and the plaintiff in error, and in this connection, it is to be noticed that under this certificate a liability might be established against the receiver and not against Colvin. Even if it can be said that a receiver and his employe can be sued jointly for injuries resulting from the negligent act of the employe, this record presents distinct controversies. Failure to prove the negligence against Colvin would not, necessarily, entitle the receiver to a verdict in his favor. He is also charged with negligence in the operation of the crossing gates, to which the duties of Colvin did not extend. If negligence in the operation of the crossing gates was the proximate cause of the injury, the plaintiff could recover against the receiver, but not against Colvin. Surely, under such a record, it cannot be said, as was said in the

case of *Chicago, Rock Island & Pacific Railway* against *Martin*, that there is no separable controversy.

In *Beuttel* vs. *C. M. & St. P.*, 26 Fed. 51, Mr. Justice Shiras, illustrated the distinct controversy between the company and its engineer, in a suit wherein facts were presented whereby judgment could be entered against the company, though a verdict might go in favor of the engineer, and held that in such a suit the controversy was separable. He stated in his conclusion as follows:

"Under the averments of fact in the petition, two controversies are presented, one between plaintiff and defendant Emsley, and one between plaintiff and the defendant company. In the controversy between plaintiff and Emsley, the company has no part nor lot. It has no legal interest therein; and if the plaintiff and Emsley were citizens of different States, the latter could remove the action, even if the company and plaintiff were citizens of the same State. In the controversy between plaintiff and the company, Emsley has no legal interest. The cause against the company not only can be separated, but must be separated from that against Emsley, because the grounds of liability are legally different. Although the case may be tried as one before the same jury, the issues upon which the liability of the defendants depends are different, and cannot be made the same by any form of averment in the petition."

The case of *Chicago, Rock Island & Pacific Railway* vs. *Martin*, 178 U. S. 245, above referred to, was one in which no separable controversy, as between the different defendants, was presented. They were jointly liable, and hence, it was held the suit could not be removed, except upon the joint application of the defendants, even though, as to one, the suit arose

under the constitution and laws of the United States. Here, the controversy is separable. The certificate, on its face, shows the railway company is not liable, and no case is stated against it. It appears, furthermore, that Colvin is only in the case as the employe of the receiver, and that his acts were involved in only one branch of the suit, and that, as to that, a joint liability was not shown; that the case against the receiver went much further, and a possible liability was raised against him, without regard to the negligence of the engineer. Therefore, there is a separable controversy, and as to that controversy, the receiver stands alone, and, under the authority of the case last mentioned, he could rightfully remove the case on his sole application.

The plaintiff in error has referred to a number of cases holding there can be no removal, unless it appears by the plaintiff's own statement, that the case is one arising under the constitution or laws of the United States. This court has pointed out the distinction between a case in which the claim is based upon a law of the United States and one in which the right of removal depends upon the character of the defendant. In the latter case, the right of removal cannot be prevented by failure of the plaintiff to state the defendant's true character or a misstatement of that character. It was so decided in the case of *Texas & Pacific Ry. Co.* vs. *Cody*, 166 U. S. 606.

Moreover, the questions submitted are to be answered upon the facts stated in the certificate and the character of the defendant is clearly shown therein.

Defendants in error, therefore, again respectfully submit that the questions presented by the Circuit Court of Appeals of the Seventh Circuit, should be answered in the affirmative.

Respectfully,

W. S. HORTON,

Attorney for Defendants in Error.